

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHAN ALLEN HAWK,

Defendant-Appellant.

UNPUBLISHED

August 27, 2020

No. 352574

Oceana Circuit Court

LC No. 19-013712-FH

Before: SHAPIRO, P.J., and SERVITTO and LETICA, JJ.

SHAPIRO, P.J. (*dissenting*).

I respectfully dissent as I do not believe there was probable cause to arrest defendant. The arrest occurred at the Electric Forest Music Festival. Defendant was arrested during an undercover operation directed at Darby Zufall. Zufall, through social media, had agreed to sell LSD to a person who unbeknownst to her was a Michigan State Police detective. The detective made arrangements to meet Zufall near one of the tents set up on the festival grounds. There was no evidence that defendant had any involvement or provided any assistance in making these arrangements.

When Zufall arrived, she was accompanied by defendant. The detective testified that he shook their hands when they arrived. The detective asked Zufall to show him the LSD and she removed a tin foil packet from her pocket. The detective told Zufall that he had never taken LSD and at that point defendant told him that it was strong LSD and to “be careful with it.” The detective then gave a signal to uniformed officers who proceeded to arrest both Zufall and defendant.

The detective testified at defendant’s preliminary hearing and he agreed that the sole reason he concluded there was probable cause to arrest defendant was because of defendant’s presence and his comment warning the detective of the need to “be careful with it.” Defendant’s presence is of limited if any probative value. Mere presence is not grounds to arrest. Indeed, “[m]ere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to establish that a defendant aided or assisted in the commission of the crime.” *People v Norris*, 236 Mich App 411, 419-420; 600 NW2d 658 (1999). The detective suggested in his

testimony that anyone accompanying a drug seller to a transaction must be part of the sale as either protection or transportation because people do not otherwise accompany sellers. However, this drug sale did not occur in a private or secluded location at which a second person's presence would create a high index of suspicion. Here, the attempted sale occurred in the middle of a music festival well-known for attendees' use of psychedelic drugs. In such a setting it would not be unusual for a seller to be with a person not involved in the sale. Further, the detective could not articulate any factual basis to find that the defendant assisted Zufall other than defendant's response to the detective's comment that he had never taken the drug before. Defendant told the detective that the drug was strong and that he should "be careful with it." I do not see how that can be construed as an action in furtherance of the sale. If the defendant wanted to assist Zufall in completing the sale, he would instead have advised a concerned purchaser that the drug was not too strong and not to be concerned. Indeed, telling a novice user that the drug was strong and that care was required could easily lead to the sale being cancelled.

At best, the detective had only a hunch or suspicion of defendant's involvement in the drug transaction, which is an insufficient basis on which to justify an arrest. *People v Johnson*, 81 Mich App 70, 75; 264 NW2d 125 (1978). Accordingly, I would conclude that the trial court erred by denying defendant's motion to suppress evidence obtained as a result of his unlawful arrest.

/s/ Douglas B. Shapiro